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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. DEMETRIUS LAMONT BROOKS, Defendant and Appellant.	B209618 (Los Angeles County Super. Ct. No. GA 065918)

Appeal from a judgment of the Superior Court for the County of Los Angeles. Dorothy L. Shubin, Judge. Affirmed.

Waldemar D. Halka, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec, Supervising Deputy Attorney General, and Robert C. Schneider, Deputy Attorney General, for Plaintiff and Respondent.

SUMMARY

Demetrius Lamont Brooks was convicted by a jury of several felonies, including a forcible lewd act upon a child, sexual battery by restraint and criminal threats, and was sentenced to 11 years, four months in state prison. He contends that the lewd act and sexual battery convictions should be reversed because the trial court allowed the prosecutor to present evidence of prior sexual batteries. He also asserts that the trial court erred in failing to instruct on lesser included offenses with respect to the sexual battery and criminal threat convictions, and that there was error in the sentencing. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

An amended seven-count information charged Brooks with six felonies and a misdemeanor in connection with his conduct on June 5, 2006. On that date, Brooks boarded a bus in Pasadena carrying an open can of beer. The driver, Rhonda K., told him drinking was not permitted on the bus and asked for the fare. Brooks cursed at her, refused to pay the fare, and sat down in the back of the bus. Brooks made a series of comments to the driver, telling her she was sexy and beautiful and that he was going to rape her when the bus came to the end of the line. At first, Rhonda K. did not take his comments seriously, because it was mid-morning and there were other passengers on the bus. Brooks eventually moved to the front of the bus and sat near Rhonda K.

After the last passenger left the bus, Brooks told Rhonda K. he wanted to get off at the next stop. When Rhonda K. stopped the bus, Brooks approached her and said, "Before I get off this bus, I am getting this pussy." He grabbed and squeezed Rhonda K.'s breast and vaginal area. The driver fought Brooks, hitting him repeatedly with the ticket punch and kicking him in the groin; Brooks continued saying "I am just getting this pussy." When he was kicked, Brooks bent over and hit his head. He reached for the bus day passes that were located in the front of the bus, but they fell to the floor. Brooks had his arms around Rhonda K. and was blocking the area between the driver and the door, preventing her from getting off the bus. Rhonda K. was eventually able to kick Brooks down the stairs and out of the bus. Brooks stumbled and fell to the ground. He then told

Rhonda K. he was going to "187" her, which she understood to mean he was going to murder her. Rhonda K. was frightened and immediately drove the bus to the nearest sheriff's station, where she reported the incident.

Meanwhile, Brooks walked to the area of Woodbury Road and Raymond Avenue in Pasadena, where he picked up a metal road barricade and tossed it in front of an approaching pickup truck driven by Robert Johnson, causing $1,590 in damage to the truck. Johnson got out of his truck and tried to talk to Brooks, but Brooks was incoherent; his eyes were bloodshot and his forehead was bleeding. Johnson called the police.

Brooks then walked to a nearby bus stop, near an ARCO service station. He approached Charles S., a ten-year old boy who was walking toward the ARCO station. Brooks stared at Charles S. and then began chasing him. Brooks caught Charles S. and grabbed him from behind just below his throat, wrapping his arms around Charles's chest and lifting him up and down off the ground as Charles S. struggled to get away. Charles S. was scared and crying. Johnson saw the assault on Charles S. He said Brooks "started molesting [Charles S.] from behind." Brooks' "genital area was against the child's butt," and Brooks was rubbing against Charles S. with a "humping motion." Bennie Williams also saw Brooks assaulting Charles S.; he said Brooks was "jerking up at [Charles S.] . . . ." Brooks' pelvic area was up against Charles S. and Brooks was thrusting his pelvic area at Charles's buttocks. Williams said Brooks' actions "appeared sexual."

Charles S. was crying and screaming, and eventually bystanders intervened. The police arrived and Brooks was arrested. As Brooks was being transported to the station in a police car, he broke the car's door handle, causing less than $400 in damages.

Brooks was charged in an amended information with six felonies:

- A forcible lewd act upon a child (count 1) (Pen. Code, § 288, subd. (b)(1));[1]
- Sexual battery by restraint as to Rhonda K. (count 2) (§ 243.4, subd. (a));
- Criminal threats (count 3) (§ 422);

[1] Further statutory references are to the Penal Code unless otherwise specified.

- Attempted first degree robbery of a transit operator (count 4) (§§ 664, 211);
- Vandalism with damage of over $400 (count 5) (§ 594, subd. (a)); and
- Assault by means likely to produce great bodily injury as to Charles S. (count 7) (§245, subd. (a)(1)).

Brooks was also charged with misdemeanor vandalism in connection with damaging the police car door (count 6) (§ 594, subd. (a)). As to the six felony counts, a prior conviction was alleged for which a prison term was served as described in section 667.5, subdivision (b); it was further alleged Brooks did not remain free of prison custody, and suffered a felony conviction, during the five year period subsequent to the conclusion of the prison term.

During the trial, the trial court permitted the prosecution to adduce evidence of two prior sexual batteries involving Brooks, under Evidence Code sections 1101 and 1108. In March 2006, Katrina C., who was 19 years old, was sitting at a bus stop in Pasadena. Appellant sat down next to her and asked her if she wanted to make $10. She said no, but Brooks continued to tell her, "Come on you, you know you want to make the $10." Brooks then placed his hand on the inside of Katrina's thigh and began to rub it; Katrina told him to stop, but he continued to touch her. Then he put his hand on her breast and fondled it, and put his hand on her vaginal area. Katrina ran off; Brooks ran after her, but Katrina eventually lost sight of Brooks. She called the police, who apprehended Brooks, and Katrina identified Brooks as the perpetrator.

A second incident occurred in November 2002. Rainbow G., then 16 years old, was walking on a street in Pasadena when she noticed Brooks following her. Brooks said he was "horny" and wanted to "get some." Rainbow told him to leave her alone, but he kept following her and repeating that he was "horny" and "wanted some." Brooks caught up with Rainbow and grabbed her buttocks and vagina. As they struggled, Brooks pulled down his pants and exposed his penis. Rainbow was able to escape and called the police, who located and detained Brooks. Rainbow positively identified Brooks as the perpetrator.

Brooks was convicted by a jury of the felonies charged in counts 1, 2, 3, and 5 (forcible lewd act upon a child, sexual battery by restraint, criminal threats, and vandalism in connection with Johnson's truck), and of misdemeanor vandalism in connection with the damage to the police car (count 6). The jury acquitted him on the charge of attempted robbery (count 4) and on the charge of assault by means likely to produce great bodily injury in connection with Charles S., but convicted him of the lesser included offense of assault, a misdemeanor (count 7).

On July 17, 2008, Brooks was sentenced to state prison for a total of 11 years and four months, consisting of the high term of eight years on count 1 (forcible lewd act on a child) as the base term, plus an additional one year for the prison prior under section 667.5, subdivision (b); one year consecutive (one-third of the middle term) on count 2 (sexual battery by restraint); eight months consecutive (one-third of the middle term) on count 3 (criminal threat); eight months consecutive (one-third of the middle term) on count 5 (vandalism over $400); one year concurrent on count 6 (misdemeanor vandalism); and six months, stayed under section 654, on count 7 (the lesser included misdemeanor assault as to Charles S.). The court also imposed various fines, ordered restitution to Robert Johnson, and made other orders, none of which is at issue in this appeal.

DISCUSSION

Brooks contends that (1) reversal of counts one and two – forcible lewd act upon a child and sexual battery by restraint – is required because it was error to admit the evidence of Brooks' prior sexual batteries, and (2) the sexual battery and criminal threat convictions should be reversed because the trial court failed to instruct the jury on the lesser included offenses of attempted criminal threat and attempted sexual battery by restraint. Brooks also asserts cumulative error affecting the verdict and sentencing errors. None of his claims is well taken.

1. The court did not abuse its discretion in admitting evidence of Brooks' prior sexual batteries.

Brooks argues the trial court erred in admitting the evidence of his prior sexual batteries, because the evidence was "irrelevant and not very probative" as to the issues for which it was admitted (identity, intent, motive, and common plan or scheme) and because it was more prejudicial than probative under Evidence Code section 352. Specifically, Brooks contends the evidence was irrelevant for the purpose of establishing his intent to molest a 10-year-old boy, or to establish any predisposition to molest young children, and was cumulative and unnecessary to establish his motive or intent as to Rhonda K.[2] And, Brooks claims, even if it was "technically relevant and admissible under sections 1101 and 1108," the evidence should have been excluded under section 352 as more prejudicial than probative. We disagree.

Evidence Code section 1101 makes evidence of a person's character, including in the form of specific instances of his or her conduct, inadmissible except when relevant to prove some fact other than the person's disposition to commit a crime or civil wrong, and except as provided in specified sections of the Evidence Code, including Evidence Code section 1108. (Evid. Code, § 1101, subds. (a) & (b).) Evidence Code section 1108 provides that, in a criminal action accusing the defendant of a sexual offense, "evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." (Evid. Code, § 1108, subd. (a).) Under Evidence Code section 352, the court has the discretion to exclude evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the

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[2] Brooks also argues the evidence was irrelevant on the issues of identity and common plan or scheme, because Brooks did not dispute that he was the person involved in the incidents, and this was not a case involving signature-type crimes. Because the evidence was relevant to establish intent, we need not address this claim.

jury." The trial court's ruling is reviewed for abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 724.)

Here, the evidence of Brooks' prior sexual batteries of Katrina C. and Rainbow G. was relevant to prove the sexual nature of Brooks' intent in his attacks on both Charles S. and Rhonda K.[3] As the trial court observed, "[t]he evidence goes to show the defendant had sexual intent as to both the child and the driver in our particular case . . . . And I think the circumstances are similar in that they occurred in public where the defendant approached someone, including a minor." Responding subsequently to counsel's argument that the alleged victim (in Charles S.'s case) was a male child rather than an adult female, the trial court noted that "it is a similar type of touching, also in a public place, and an unwanted approach in a public place for an allegedly sexual purpose." We can see no basis for disagreeing with the trial court's conclusion that the evidence was plainly relevant to proving Brooks' sexual intent.

Nor can we discern any basis for Brooks' claim that the trial court should have excluded the evidence of his past sexual batteries because it was more prejudicial than probative under Evidence Code section 352. The authorities teach that, under sections 1108 and 352, "the probative value of the evidence must be balanced against four factors: (1) the inflammatory nature of the uncharged conduct; (2) the possibility of confusion of issues; (3) remoteness in time of the uncharged offenses; and (4) the amount of time involved in introducing and refuting the evidence of uncharged offenses." (*People v. Branch* (2001) 91 Cal.App.4th 274, 282.) That is exactly what the trial court did:

> "I considered the prejudicial impact. There will be some prejudice to Mr. Brooks by the presentation of the evidence because it may well help the People establish the intent, motive, opportunity and plan in our

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[3] The elements of the crime of a lewd act with a child include proof the act was committed "with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of [the defendant] or the child . . . ." (§ 288, subd. (a).) Likewise, an element of sexual battery is a touching "for the purpose of sexual arousal, sexual gratification, or sexual abuse . . . ." (§ 243.4, subd. (a).)

> case. But I am considering the following under [*People v. Ewoldt* (1994) 7 Cal.4th 380] and other applicable authority, is the evidence more probative because it is from a source independent from the evidence charged in this offense, and the answer is yes. Did it result in a criminal conviction. The answer is yes.[4] Will the evidence be more inflammatory than the evidence in the case at bar that is charged? And the answer there is no. It is of a similar type of nature and seems somewhat less egregious. And finally what is the lapse of time between those cases and our case. Both of them are relatively recent. . . . [¶] So in conclusion in balancing all those factors, I am finding that any prejudicial impact is substantially outweighed by the relevance of those charges. It will not take an undue consumption of time. At most a few witnesses will testify as to those prior cases. Also the court will listen to [*sic*] any prejudicial impact by giving a limiting instruction . . . ."

Brooks' claim that the evidence was "inflammatory" and created an "intolerable" risk to the fairness of the proceeding because it "tended to evoke an emotional bias" against Brooks "as someone who sexually victimizes women" is simply hyperbole. Under Brooks' rationale, evidence of prior sexual offenses would always be unduly prejudicial. But in applying Evidence Code section 352, """prejudicial" is not synonymous with "damaging,""" but refers instead to "'evidence which uniquely tends to

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[4] In *People v. Ewoldt*, the court explained: "The probative value of evidence of uncharged misconduct also is affected by the extent to which its source is independent of the evidence of the charged offense. . . . [¶] On the other side of the scale, the prejudicial effect of [the evidence in *Ewoldt*] is heightened by the circumstance that defendant's uncharged acts did not result in criminal convictions. This circumstance increased the danger that the jury might have been inclined to punish defendant for the uncharged offenses, regardless whether it considered him guilty of the charged offenses, and increased the likelihood of 'confusing the issues' [citation], because the jury had to determine whether the uncharged offenses had occurred. [¶] The testimony describing defendant's uncharged acts, however, was no stronger and no more inflammatory than the testimony concerning the charged offenses. This circumstance decreased the potential for prejudice, because it was unlikely that the jury disbelieved . . . testimony regarding the charged offenses but nevertheless convicted defendant on the strength of . . . testimony regarding the uncharged offenses, or that the jury's passions were inflamed by the evidence of defendant's uncharged offenses." (*People v. Ewoldt, supra,* 7 Cal.4th at pp. 404-405.)

evoke an emotional bias against defendant as an individual and which has very little effect on the issues.'" (*People v. Bolin* (1998) 18 Cal.4th 297, 320.) This is not such a case. And, as the trial court's discussion confirms, Brooks' claims of confusion, remoteness, and undue consumption of time are likewise without basis. The trial court carefully weighed the applicable factors, and we may reverse its ruling only if the ruling was "'arbitrary, whimsical, or capricious as a matter of law.'" (*People v. Branch, supra*, 91 Cal.App.4th at p. 282.) In this case, it was not.

2. The court did not err in failing to instruct on the lesser included offenses of attempted criminal threat and attempted sexual battery by restraint.

In criminal cases, even absent a request, the trial court must give instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present, but the court need not do so when there is no evidence that the offense was less than that charged. (*People v. Breverman* (1998) 19 Cal.4th 142, 154, 162 ["a trial court errs if it fails to instruct, sua sponte, on all theories of a lesser included offense which find substantial support in the evidence"].) "[T]he existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury." (*Id.* at p. 162.) In this context, substantial evidence "is '"evidence from which a jury composed of reasonable [persons] could . . . conclude[]"' that the lesser offense, but not the greater, was committed." (*Ibid.*) Claims of failure to instruct on an asserted lesser included offense are subject to de novo review. (*People v. Cole* (2004) 33 Cal.4th 1158, 1218.)

Brooks claims that the court should have instructed the jury on the lesser included offenses of attempted criminal threat and attempted sexual battery by restraint. We reject both claims.

a. Attempted criminal threat.

Attempted criminal threat is a lesser included offense of criminal threat. An attempted criminal threat occurs, for example (and as Brooks claims here) "if a defendant, . . . acting with the requisite intent, makes a sufficient threat that is received and understood by the threatened person, but, for whatever reason, the threat does not *actually* cause the threatened person to be in sustained fear for his or her safety even though, under the circumstances, that person reasonably could have been placed in such fear . . . ." (*People v. Toledo* (2001) 26 Cal.4th 221, 231.) Brooks argues that there was "a real question whether the sustained fear element necessary for a criminal threat conviction had been met in this case," and cites *People v. Toledo*, where the court observed the jury "might have entertained a reasonable doubt … as to whether the threat *actually* caused [the victim] to be in such fear." (*Id.* at p. 235.) Brooks claims that the jury could have concluded, if instructed on attempted criminal threat, that Rhonda K. was frightened by Brooks' sexual battery on her and not by his threat to kill her. The flaw in Brooks' argument is that it is based on pure speculation; there was no evidence whatsoever to support it. (See *People v. Acevedo* (1985) 166 Cal.App.3d 196, 201 ["disbelief of all or part of the prosecution case does not require instruction on lesser included offenses"].) Rhonda K. testified without equivocation that she was frightened by Brooks' threat, and immediately drove the bus to the Sheriff's Department.[5] In *People v. Toledo*, by contrast, the victim herself testified that she was not frightened by the defendant's statements. (*People v. Toledo, supra*, 26 Cal.4th at p. 235.) In short, in this case there was no evidence – much less evidence "'substantial enough to merit

[5] Rhonda K. testified: "I rush back to the bus, and you know, he is trying to get up. I guess he stumbled, and I guess hurt himself. That is when he told me he is going to '187' me, if I come back down here, when I am coming back the return trip, he is going to '187' me." When she was asked what she took that to mean, she replied, "Murder, he is going to kill me." When asked how that made her feel, she answered: "I was scared, and then I really realized this was no joke, so I closed the door and proceeded to continue on Santa Anita to Altadena Drive to the Sheriff's Department."

consideration'" – from which a reasonable jury could conclude "that the lesser offense, but not the greater, was committed." (*People v. Breverman, supra,* 19 Cal.4th at p. 162.)

b. Attempted sexual battery by restraint.

Brooks similarly argues that the evidence supported, and the trial court was therefore required to instruct the jury on, the lesser included offense of attempted sexual battery by restraint. His theory is that Rhonda K.'s testimony showed he tried to restrain Rhonda K. unlawfully inside the bus, but that she "prevented him from accomplishing this act by beating him with a ticket puncher, kicking him in the groin, and pushing him out of the vehicle." Brooks is wrong again.

The trial court instructed the jury on sexual battery by restraint (which is committed "while [the victim] is unlawfully restrained by the accused or an accomplice" (§ 243.4, subd. (a))), and on the lesser included offense of misdemeanor sexual battery (which does not require unlawful restraint). (§ 243.4, subd. (e)(1).) The contention that Brooks was *also* entitled to an instruction on attempted sexual battery by restraint – on the theory that he merely attempted to restrain Rhonda K. in the course of the sexual battery – is incongruous. First, we entertain considerable doubt that the absence of an element of a charged crime (the unlawful restraint), which necessarily reduces the crime from a felony to a misdemeanor, also necessarily converts it to an attempted felony, as to which the trial court is required, sua sponte, to instruct the jury.[6] Second, even if it does, again, an instruction must be given only if there was evidence from which a reasonable jury could conclude "that the lesser offense, but not the greater, was committed." (*People v. Breverman, supra,* 19 Cal.4th at p. 162.) The only evidence was that Brooks had his arms around Rhonda K. and was blocking the area between the driver and the door, preventing her from getting off the bus. We are compelled to agree with the People that "if it takes beating, kicking and pushing to overcome an assailant" in the course of a

[6] "An attempt to commit a crime is comprised of 'two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission.'" (*People v. Medina* (2007) 41 Cal.4th 685, 694 ["[o]ther than forming the requisite criminal intent, a defendant need not commit an element of the underlying offense"].)

sexual battery, the victim has been unlawfully restrained. And third, any error in failing to instruct on attempted sexual battery by restraint was patently harmless. The jury concluded Rhonda K. was in fact unlawfully restrained; there is no reasonable probability that the jury would have found otherwise had it been given an attempt instruction. (*People v. Breverman, supra,* 19 Cal.4th at p. 165 [failure to instruct on a lesser included offense in a noncapital case "is not subject to reversal unless an examination of the entire record establishes a reasonable probability that the error affected the outcome"].)[7]

3. There were no constitutional violations in Brooks' sentencing.

Brooks' crimes were committed on June 5, 2006. He was convicted on July 1, 2008, and sentenced on July 17, 2008. The trial court selected the upper term on count 1 (lewd act on a child), finding that the facts were "egregious in terms of that count," that the aggravating factors outweighed mitigating factors, and that there was evidence to support all of the nine different aggravating factors listed in the probation report. (These included that Brooks served prior prison terms, that he was on probation or parole when the crime was committed, and that his prior performance on probation or parole was unsatisfactory.) And, "because the aggravating factors so outweigh any mitigating factors," the court imposed consecutive sentences on counts 2, 3 and 5, also stating that the crimes "involved separate acts of violence and . . . their objectives were predominantly independent of each other."

Brooks argues that the court could not constitutionally impose the upper term, because the crimes occurred on June 5, 2006, and the sentencing law in effect at that time entitled him to the "presumptive middle term punishment" under *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*). He claims that application of the sentencing scheme in effect at the time of his sentencing would violate the *ex post facto*

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[7] Brooks also asserts reversal is required based on the cumulative effect of the trial court's errors. Because we have found no error, this claim necessarily fails.

clause of the United States Constitution. *People v. Sandoval* (2007) 41 Cal.4th 825 (*Sandoval*) precludes Brooks' claims.

We recap the background for Brooks' claim. In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The "statutory maximum" means "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." (*Blakely v. Washington* (2004) 542 U.S. 296, 303.) In *Cunningham*, the high court applied these rules to California's determinate sentencing law (DSL), under which a trial judge was required to impose the middle term unless it made factual findings regarding circumstances in aggravation or mitigation of the crime. *Cunningham* concluded that the DSL violated a defendant's right to trial by jury, because it authorized the judge, and not the jury, to find the facts that rendered a defendant eligible for an upper term sentence. (*Cunningham, supra*, 549 U.S. at p. 293.)

In response to the *Cunningham* decision, the Legislature amended the DSL, effective March 30, 2007, to eliminate the offending provisions. The amended statute allows a sentencing court to exercise its discretion to select among the lower, middle and upper terms. (§ 1170, subd. (b) ["[w]hen a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court"].) Then, on July 19, 2007, the California Supreme Court decided *Sandoval, supra*, 41 Cal.4th 825.

In *Sandoval*, the trial court had imposed the upper term in violation of the defendant's Sixth Amendment rights as established in *Cunningham*; the Supreme Court concluded the error was not harmless, and it was necessary to remand the case for resentencing. *Sandoval* expressly directed that "sentencing proceedings to be held in cases that are remanded because the sentence imposed was determined to be erroneous under *Cunningham* . . . are to be conducted in a manner consistent with the amendments

to the DSL adopted by the Legislature."[8] (*Sandoval, supra*, 41 Cal.4th at pp. 846-847 ["[t]he trial court will be required to specify reasons for its sentencing decision, but will not be required to cite 'facts' that support its decision or to weigh aggravating and mitigating circumstances"].)

Sandoval further observed that the Legislature's action in amending the DSL made it unnecessary for the court to decide whether to reform the statute judicially "with regard to its application for all future cases." (*Sandoval, supra*, 41 Cal.4th at p. 849.) But, the court added that "[t]o the extent . . . that our holding might be characterized as a limited reformation of the statute with regard to its application in resentencing proceedings, such a reformation is appropriate." (*Ibid.*) Moreover, in *Sandoval*, the court rejected the defendant's claim that resentencing her under a scheme in which the trial court has discretion to impose any of the three terms would deny her due process of law and violate the prohibition against ex post facto laws (*id.* at pp. 853-857), and concluded that "the federal Constitution does not prohibit the application of the revised sentencing process . . . to defendants whose crimes were committed prior to the date of our decision in the present case." (*Id.* at p. 857.) Accordingly, and consonant with *Sandoval*, there is no merit to Brooks' claim that California is required "to retain the presumptive middle term of imprisonment for any crimes committed before the *Cunningham* decision."[9]

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[8] The court observed that it was "arguable" that the amendments to the DSL should be viewed as a change in procedural law, and therefore applicable to any sentencing proceedings conducted after the effective date of the amendments. However, the court did not decide that issue, "because even if we assume that the recently enacted legislation does not, by its own terms, apply to cases that are remanded for resentencing, this court would have the responsibility and authority to fashion a constitutional procedure for resentencing in cases in which *Cunningham* requires a reversal of an upper term sentence." (*Sandoval, supra*, 41 Cal.4th at pp. 845-846.)

[9] Brooks also contended in his opening brief that the consecutive sentences imposed by the trial court for his sexual battery, criminal threat and felony vandalism convictions violated his federal constitutional rights to jury trial and due process of law as formulated in *Cunningham*. He concedes in his reply brief, however, that the United States Supreme Court has decided this issue adversely to him in *Oregon v. Ice* (2009) ___ U.S. ___, 129

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BENDIX, J.*

We concur:

RUBIN, Acting P.J.

FLIER, J.

S.Ct. 711, 714-715, 718 [when defendant has been convicted of multiple offenses involving discrete sentencing prescriptions, the Sixth Amendment does not mandate jury determination of facts that permit the imposition of consecutive sentences].

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.